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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 815

DONALD C. BARNES, TRUSTEE IN DISSOLUTION FOR ENGINEERS PUBLIC SERVICE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 9–12) is reported in 137 F. Supp. 716.

JURISDICTION

The judgement of the Court of Claims was entered January 31, 1956. (Pet. 12.) The petition for a writ of certiorari was filed on March 31, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255 (1).

QUESTION PRESENTED

Whether the six-year period for bringing suit in the Court of Claims under Section 2501, 28

U. S. C., to recover interest on an overassessment of tax begins to run when the Commissioner signs the schedule of overassessments which, under Section 3770 (a) (3) of the Internal Revenue Code of 1939, is the date of allowance of such refund, or whether such period does not start to run until 30 days after the Commissioner makes the report to the Joint Committee on Internal Revenue Taxation under Section 3777 (a).

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 3770. AUTHORITY TO MAKE ABATEMENTS, CREDITS, AND REFUNDS.
>
> (a) *To Taxpayers.*—
>
> * * * * *
>
> (3) *Date of allowance.*—Where the Commissioner has signed a schedule of overassessments in respect of any internal revenue tax imposed by this title, the Revenue Act of 1932, or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax.
>
> * * * * *
>
> (26 U. S. C. 1952 ed., Sec. 3770.)
>
> SEC. 3777. REPORTS OF REFUNDS AND CREDITS IN EXCESS OF $75,000.
>
> (a) *By Commissioner to Joint Committee.*—No refund or credit of any income, war-profits, excess-profits, estate, or gift tax in excess of $75,000 shall be made until

after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Commissioner is submitted to the Joint Committee on Internal Revenue Taxation.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3777.)

28 U. S. C.:

§ 2501. *Time for filing suit.*

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

* * * * *

STATEMENT

Petitioner is the trustee in dissolution for Engineers Public Service Company, hereinafter referred to as the taxpayer. The taxpayer duly filed consolidated income and excess profits tax returns and paid the tax shown thereon for the years 1942, 1943, 1944, and 1945. It later filed timely claims for refund for the years 1942 and 1943. (C. Cls. Pet. 16–23.) After consideration of these claims and after adjustments to the income and excess profits tax liability of the taxpayer, including the carry-back of an unused ex-

cess profits tax credit from 1944 and 1945, the Commissioner of Internal Revenue determined deficiencies in income taxes for the years 1942, 1943, 1944 and 1945 and overassessments in excess profits taxes for the years 1942 and 1943. (Pet. 9.)

On May 19, 1948, the taxpayer filed a waiver consenting to the assessment and collection of the income tax deficiencies and accepting the overassessments in excess profits taxes. On April 20, 1949, the Commissioner of Internal Revenue submitted his report to the Joint Committee on Internal Revenue Taxation pursuant to the provisions of Section 3777 (a) of the Internal Revenue Code of 1939. On May 4, 1949, the Commissioner signed the schedule of overassessments relating to taxpayer's 1942 excess profits tax overpayment. This schedule showed that part of the overassessment was credited to the taxes due and part was refunded. On July 12, 1949, the refund check for the amount shown as refundable together with interest was issued. The certificate of overassessment showing the details of the credit and refund of the 1942 overpayment of excess profits tax and interest allowances with respect thereto was mailed on July 21, 1949. This suit was instituted in the Court of Claims on May 6, 1955. (Pet. 9–10.)

The United States, defendant below, on August 30, 1955, filed a motion to dismiss the petition on the ground that it failed to state a cause of action

against the United States and that the suit was barred by the provisions of 28 U. S. C., Section 2501. The Court of Claims granted defendant's motion, and the petition was dismissed. (Pet. 12.)

ARGUMENT

The interest in the amount of approximately $18,000 sought to be recovered here results from the action of the Commissioner of Internal Revenue in determining and allowing, on May 4, 1949, an overassessment of excess profits tax for the year 1942. Under the provisions of Section 3771 (a) and (b) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 3771) interest is due a taxpayer on an overassessment which is either refunded or credited. The Commissioner allowed interest on the overassessment, a part of which was refunded and a part credited, but the taxpayer contended that it was entitled to additional interest on that part of the overassessment credited against other taxes. More than three years after the Commissioner's refusal to pay this interest (C. Cls. Pet. 26), this suit was instituted in the court below on May 6, 1955. Under the specific provisions of Section 3770 (a) (3) of the Internal Revenue Code of 1939, *supra,* p. 2, the date the Commissioner signed the schedule of overassessments was the "date of allowance" of the refund or credit. This date was May 4, 1949, and that was the date that the court below correctly held was when the cause of action to re-

cover interest on this refund accrued.[1] This suit was not instituted until six years and two days after that date, and the Court of Claims accordingly held that it was barred by the six-year statute of limitations.

This decision of the court is clearly correct. It was the action of the Commissioner in allowing the overassessment which gave rise to the claim for interest, and the statute clearly provides that the allowance of such overassessment resulting in a refund or credit takes place when the Commissioner signs the schedule of overassessments. The Court of Claims correctly relied in part on its earlier decision in *Colgate-Palmolive Peet Co.* v. *United States,* 58 F. 2d 499 (C. Cls.). That case also involved a suit for interest on a refund or credit in which that court had held that the date of allowance of the claim was the date when the cause of action for recovery of interest accrued. See also *Consolidated Paper Co.* v. *United States,* 59 F. 2d 281, 289 (C. Cls.), new trial overruled, 1 F. Supp. 858, certiorari denied, 288 U. S. 615.

It was contended in the court below, as it is here, that the date of the signing of the schedule was not the date the cause of action accrued, but

[1] Since this was a suit to recover additional interest on an overassessment of taxes and not a suit for refund of interest paid by the taxpayer, the general six-year statute of limitations in Section 2501, 28 U. S. C., *supra*, p. 3, applies rather than the provisions of the Internal Revenue Code dealing with the recovery of taxes or interest thereon erroneously assessed and collected.

May 20, 1949, which was 30 days after the date the Commissioner submitted his report to the Joint Committee on Internal Revenue Taxation. Under Section 3777 (a) of the Internal Revenue Code of 1939, *supra,* p. 9, it is provided that no refund or credit of any excess profits tax in excess of $75,000 shall be made until after the expiration of 30 days from the date of the report by the Commissioner to the Joint Committee on Internal Revenue Taxation. The court below, however, was of the opinion that the submission of a report to the Joint Committee was not intended to and did not suspend the taxpayer's right to sue for the interest on the amount of the overpayment credited. (Pet. 11.)

This construction of the statute is supported both by its terms and by the legislative history. Provisions similar to those in Section 3770 (a) (3) first appeared in the Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 1104. The Senate Report (S. Rep. No. 665, 72d Cong., 1st sess., pp. 57–58 (1939–1 Cum. Bull. (Part 2) 496, 537)) stated that it was felt necessary to fix the date of allowance of refunds or credits because of certain court decisions holding that the allowance of the refund or credit took place upon the signing of the second schedule. (Under the old practice of the Commissioner's office, two schedules were issued and the Commissioner signed both of them.) The report stated that the provisions enacted in the new section "establish a rule which accords

with the practice of the Treasury and permits the allowance of refunds and credits with the minimum of difficulty to the Government and the taxpayers as well." At that time provisions similar to Section 3777 (a) of the Internal Revenue Code were already in effect, requiring the report to the Joint Committee on Internal Revenue Taxation.[2] If Congress had intended the date prescribed in Section 1104 of the Revenue Act of 1932, *supra*, to be extended by the provisions of Section 710 of the Revenue Act of 1928, c. 852, 45 Stat. 791, it would certainly have made some provision therefor. It did not do so; and since the allowance of the refund or credit is the event which gives rise to the claim for interest thereon, the date specifically fixed by Congress as the date of allowance is therefore the date upon which the cause of action accrues. In this connection it should be noted that the taxpayer had more than five years and eleven months after May 20, 1949, to file suit and more than five years and nine months after the refund check was issued. As the court below pointed out, this was more time than would

[2] In the Act of February 28, 1927, c. 226, 44 Stat. 1250, being the first deficiency Act for the year 1927, it was provided for the first time that no part of the appropriation authorized therein should be available for paying any claim in excess of $75,000 until after the expiration of 60 days from the date upon which a report was made to the Joint Committee on Internal Revenue Taxation. Section 710 of the Revenue Act of 1928, c. 852, 45 Stat. 791, contained provisions practically identical with those of Section 3777 (a) of the Internal Revenue Code of 1939.

have been allowed for a suit for the principal amount.[3]

There is no conflict with *Rawlings* v. *Ray*, 312 U. S. 96, where this Court held that the time for bringing suit by a receiver under a state statute to collect an assessment against the stockholder of a bank did not begin to run from the time the assessment was made but at a later date when it was expressly made payable. While here the Commissioner might not have been able to make the refund until May 20, 1949, it had been in fact and, according to law, "allowed" on May 4, 1949, when he signed the schedule of overassessments.

Further, there is no conflict with the officially unreported decision of June 18, 1936, of the District Court for the Northern District of Ohio in *Ohio Oil Co.* v. *United States*. There the question was when interest on a refund accrued for tax purposes where the taxpayer urged that the right became fixed on December 7, 1928, when the Commissioner signed final audit letters. In that case a report was made to the Joint Committee on In-

[3] Under Section 3772 (a) (2) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 3772) suit for the recovery of excess profits taxes had to be filed within *two* years from the rejection of a timely refund claim. The refund claim upon which the allowance of the overassessment was based was filed February 26, 1946 (C. Cls. Pet. 3–4), and rejected, to the extent not allowed, on July 21, 1949. (See Exhibit 1 to Defendant's Motion to Dismiss, where the following notation appears, "SECTION 3772, I. R. C. LETTER MAILED JUL 21 1949".) The time for bringing suit, therefore, expired July 21, 1951.

ternal Revenue Taxation and the court held that the interest did not accrue until 30 days after the report was made to the Joint Committee. The case did not involve a construction of Section 3770 (a) (3) or its predecessor, Section 1104 of the Revenue Act of 1932. Nor does the report show when the Commissioner signed the schedule of refunds and credits.

CONCLUSION

The decision below is correct. There is no conflict of decisions or any other ground for further review. The petition for certiorari should be denied.

Respectfully submitted.

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